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WT Docket No. 16-290

**WIRELESS TELECOMMUNICATIONS BUREAU
SEEKS COMMENT REGARDING TERRESTAR
CORPORATION'S REQUEST FOR RELIEF OF
CERTAIN 1.4 GHz CONSTRUCTION
REQUIREMENTS**

DA 16-1029
September 13, 2016

**OPPOSITION OF PETITION FOR RECONSIDERATION
OF
TERRESTAR CORPORATION (TSC)**

**BY
JEFFREY M SWARTS**

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

INTRODUCTION

1. On July 22, 2012 I - Jeffrey M. Swarts - filed an objection to the TSC debtors' 3rd Amended Plan of Reorganization in the SDNY bankruptcy court of Judge Sean Lane, Lead Case No. 11 CV 10612 (SHL). ¹ In that objection I questioned the debtors' valuation of their estates, including

¹ EXHIBIT A - Objection_to_TSC_3rd_POR-1.doc

its 1.4 GHz spectrum assets, here at issue before the FCC. I participated vigorously in the TSC bankruptcy and the associated bankruptcy of Terrestar Networks (TSN) for more than 2-years. Before Confirmation of the 3rd Amended Plan of reorganization the Swarts Claimants held 468,000 shares of TSTR.

2. I also was both a Preferred and Common equity shareholder of Loral Space & Communications LTD in its bankruptcy proceeding before Judge Robert Drain in the SDNY, Lead Case No. 03-41710(RDD). In all cases, common shareholders received nothing for years of investment in their respective companies. In both cases fiduciaries enticed investors to buy equity in their spectrum, orbital slots, intellectual property and other intangible assets by using upbeat blue sky descriptions of their assets.

3. From the purchase of the 1.4 GHz spectrum by TSC from Port LLC and CCTV, Douglas I. Brandon has been Secretary and General Counsel of Terrestar, except for a brief period post-bankruptcy when he left to work for the Terrestar debtors' counsel – Akin Gump. This Opposition brief is in response to his PETITION FOR RECONSIDERATION filed in the instant proceeding on November 9, 2017. Although the company's other PETITION filings by Counsel Regina M. Keeney for Terrestar (TSC) and Ari Q. Fitzgerald for GE Healthcare (GEHC) express the technical merits of combining the spectrum with adjacent Wireless Medical Telemetry Service (WMTS) spectrum, they do not fully appreciate the history of this licensee or its abuse of prior investors through manipulated spectrum and orbital slot valuations in bankruptcy.

4. In the company's latest comment, submitted this time by Gibson Dunn, a lengthy timeline is provided detailing the company's efforts to monetize its spectrum.² The pleading goes on for 6-pages about those efforts, but makes short-shrift of the pre-petition securities machinations and the ensuing bankruptcy that stripped shareholders of their equity. It also makes no mention of the

origin of the TSC 1.4 GHz spectrum or FCC Auction 69 that provided the authority to build a network and operate under Part 27.

5. Although the FCC was copied contemporaneously with most (if not all) of the Court filings, it is important to include them here to provide important detail to the Commission. The pre-petition timeline follows to fill in those areas neglected by Gibson Dunn in its comment.

PRE-PETITION TIMELINE

- 2008 Feb – TSC entered into the Echostar Spectrum Agreement on February 5, 2008 to lease the 1.4 GHz Band Spectrum held by Echostar Port.
- 2008 Feb – TSC filed a PRE 14C on February 28, 2008 in which the 1.4 GHz spectrum was used to issue 30 million common shares to Echostar. Jefferies did the fairness opinion that valued the spectrum at \$533.4 million, \$640 million and \$856.2 million, or \$0.23, \$0.29 and \$0.37 MHz POP.
- 2008 May – TSC increased total number of shares from 200,000,000 to 240,000,000 and issued additional Preferred Shares in exchange for PIK Notes due 2014 and secured certain rights with respect to spectrum licenses. Jefferies again did the “fairness opinion”.
- 2009 July – TSN launched TS1, with commissioning and GBBF testing to follow.
- 2009 Sept – TSC entered into a lease of 1.4 GHz Spectrum with LightSquared.
- 2009 Nov – On November 24 in a PRE 14C, TSC increased authorized shares from 240,000,000 to 800,000,000 and restated the Certificate of Designations of the Series B Preferred and Series E Preferred. No fairness opinion was offered by TSC at the time. Harbinger owned 87,673,303 shares of TSTR.
- 2010 July – TSC / 1.4 Holdings sought and received FCC consent to replace the spectrum manager lease agreement with a long-term *de facto* lease agreement, to Lightsquared, then controlled by Harbinger.
- 2010 Oct – TSC amended the 1.4 GHz spectrum lease with LightSquared on October 13, 2010. Edward Lazarus, a former partner at Akin Gump, was the FCC Chief of Staff for Chairman Julius Genakowski, when the lease revisions were approved by the Commission.
- 2010 Oct – TSN filed for bankruptcy 6-days later on October 19, 2010, with Akin Gump as its legal advisors.
- 2010 Nov – LightSquared (Skyterra) successfully launched SkyTerra 1 on November 14, 2010 utilizing the former 1.6 GHz spectrum of Terrestrial.
- 2010 Nov – Elektrobit sued non-debtor TSC on November 19, 2010 in the Supreme Court of New York for \$25.9 million as a guarantor of the TSN contract with Elektrobit.
- 2011 Feb – TSC files for Chapter 11 bankruptcy protection, with Akin Gump as its legal advisors.

² EXHIBIT B - TerreStar Letter to FCC (5.4.2018).pdf

6. In 2008 Terrestar hired Jefferies to do a “fairness opinion” of the TSC 1.4 GHz spectrum. It was filed with the SEC in February of 2008 as a Schedule 14C-PRE. It stated on pg. 20:

“Jefferies calculated the projected low, median and high value of the 1.4 GHz Band Spectrum to the Company under each business plan. Jefferies then summed the low, median and high projected values of each business plan to calculate aggregate low, median and high projected values of the 1.4 GHz Band Spectrum to the Company, assuming successful implementation of the proposed business plans. The resulting low, median and high projected values of the 1.4 GHz Band Spectrum to the Company were \$533.4 million, \$670.3 million and \$856.2 million, or \$0.23, \$0.29 and \$0.37 per MHz POP acquired in the Transactions, calculated using a discount rate of 20.0% and a terminal growth rate of 6.0%. Jefferies compared these values to the amount paid by the Company per MHz POP in the Transactions.”

This valuation, which investors relied upon to make decisions about investing in Terrestar, permitted TSC to issue an additional 30-million shares of common and the Preferred Equity – later used as the fulcrum security to take the company private in a phased, pre-packaged bankruptcy.

7. During the Confirmation of the TSC 3rd Amended Plan of Reorganization I objected to the debtors’ \$175 million valuation of the spectrum assets here at issue. I filed a supplementary document to the previously referenced EXHIBIT A included herein as EXHIBIT C, which analyzed the historical valuations, lease valuations and contemporary comparable valuation data.³

8. I took part in Confirmation hearing and cross-examined Blackstone “expert” Steve Zelin under oath. I questioned him for over an hour about his background in terrestrial spectrum valuation (he had none) and the debtors’ POR valuation of \$0.06 per MHz POP of the 1.4 GHz spectrum at issue in this proceeding. Nevertheless, Judge Lane agreed with his testimony and the debtors’ valuation. His subsequent order eliminated the common shareholders of the company from receiving any distribution, including warrants which would have protected the “prepackaged” creditors and assured a fair distribution to equity if the spectrum was found to be more valuable than anticipated. The debtors did not suggest including warrants in their POR.

³ EXHIBIT C - Supplementary Objection of Jeffrey M. Swarts.doc

9. Post-Confirmation, the reorganized TSC hired John A. Dooley and Jarvinian to do a study and valuation of the 1.4 GHz spectrum.⁴ In his report, dated September 13, 2013, Mr. Dooley suggested that the spectrum needed to be “refarmed” into a more robust 5 X 5 MHz FD-LTE configuration, bringing its value up to \$0.69 - >\$1.00 per MHz POP.

10. Partial aggregation of the existing spectrum implied values from \$0.23 - \$0.80 per MHz POP. Yes, these values by far outstrip the Confirmation value of \$0.06 per MHz POP presented by Mr. Zelin. In fact these values are consistent with the low-end values from the 2008 Jefferies’ “fairness opinion” quoted above. So, less than a year after Confirmation of the 3rd Plan of Reorganization, TSC had in hand a highly credible valuation that confirmed every valuation argument that I had made to the Court over 2-years of litigation. Further, had the Court approved the Examiner motion that I and others made, these values would have subsequently been confirmed and shareholders would have received a distribution from the estate – instead of having their legitimate claims on the estate eliminated.

11. It is curious that during the examiner motion hearings there were not sufficient funds or time to conduct a credible valuation by an acknowledged industry expert. However, pre-Confirmation, TSC was able to hire long-time consultant RKF Engineering – who had done the spot-beam configuration work on the TS-1 satellite – to evaluate the *terrestrial* 1.4 GHz spectrum. Then, a year later, post-Confirmation, Jarvinian was hired to do the same thing and found the buoyant values quoted above – once the common shareholders were no longer part of the equation.

12. TSC emerged from bankruptcy on March 7, 2013, more than 5-years ago. It is unconscionable that the reorganized company now complains that it has been victimized by the Commission for failing to make reasonable progress to build their network under Part 27. They have had more than 10-years since the licenses were authorized by the FCC to understand the sensitivity

⁴ EXHIBIT D - Jarvinian Valuation - TerreStar 1400 MHz Spectrum.pdf

WMTS devices in adjacent spectrum. Their plans to deploy a full power LTE terrestrial network should have been informed by the Lightsquared fiasco in which GPS receivers were also found to be desensitized in a similar scenario by high power ATC spectrum.

13. Similarly, the TSN spectrum in the 2.0 GHz band, as well as similar and adjacent ICO/DBSD spectrum, was purchased by Echostar and Charles Ergen in court-sponsored auctions for \$2.78 billion combined, despite prior valuations by Jefferies at 7-times that amount. It currently lies fallow as Mr. Egren has been unable or unwilling to build out this Part 27 spectrum thus far. TSN and ICO/DBSD sought and were granted authorization under the ATC rules to use their spectrum for Part 27 high power terrestrial service – the same as TSC’s 1.4 GHz spectrum.

TERRESTAR’S PART 27 BUILD-OUT REQUIREMENTS

14. The FCC awards spectrum licenses on the basis of the public interest. It is in the public’s interest to have spectrum readily available to use for needed wireless communications. During TSC’s bankruptcy the company’s fiduciaries concealed a FirstEnergy smart metering pilot program in New Jersey, Pennsylvania and Ohio from shareholders. This was a highly credible and promising pilot program that proved the propagation efficiency of the 1.4 GHz spectrum using Airspan WiMAX base stations. Because the FirstEnergy meters were outdoors, harmful interference to WMTS devices, most of which were used indoors in hospitals and doctors’ offices, was largely mitigated. In fact, it was not until April 2016 – 9-years into the Part 27 license term that Terrestar chose to abandon its WiMAX smart grid business plan in favor of what it perceived as a more profitable WMTS business. And, despite having been adjacent to the WMTS market for the *entire* period of the Part 27 license, it never occurred to TSC managers to pay for harmful interference research or even to understand the types of devices in use in the adjacent bands.

15. Not surprisingly, when Sarah Schultz – for the TSC debtors – was objecting to calls for an examiner, she repeatedly made reference to the lack of an “ecosystem” for the “narrowband” 1.4 GHz band. This was despite the *fact* that a substantial 802.16 WiMAX ecosystem and FirstEnergy pilot program was already in existence by 2011. She made these statements in a hearing further to my motion for an examiner under 1104(c) of the Chapter 11 bankruptcy code.⁵ She said:

MS. SCHULTZ: Your Honor, we do believe that Mr.
21 Swartz has failed to provide any factual support, frankly. And
22 Mr. Sorkin will address, at the very end of our conclusion, why
23 we don't think that the documents that he has submitted are
24 relevant, why they're improperly authenticated and why they
25 shouldn't be considered as evidence.

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1 But if I could just speak to a couple of the things
2 that have been raised by Mr. Swartz and I'll try to be concise.
3 Instead of concrete evidence in support of his valuation
4 allegations, *Mr. Swartz attempts to use outdated, pre-lease*
5 *reports, reports that are unrelated to TerreStar Corporation*
6 *and attempts to extrapolate the value of the 1.4 spectrum from*
7 *the value realized from the 2.0 spectrum in DBSD and TSN.*
8 First, Your Honor, if I could address why it's
9 inappropriate to extrapolate the value from the 2.0 spectrum to
10 the 1.4 spectrum. These are very different spectrums. It's
11 not just that they're located six-tenths apart on the spectrum;
12 they are very different. They have very different restrictions
13 with respect to how they can be used.
14 First of all, there are technical parameters with
15 respect to the 1.4 spectrum. Power transmission is restricted
16 on the adjacent spectrum bands which makes it difficult to --
17 it limits the transition strength. It means that you have less
18 effective signals and, frankly, at this time, makes it
19 impossible to use the 1.4 spectrum for broadband, which is what
20 Mr. Swartz was asserting. He said, you know, look at all of
21 the cell phones that are out here and everybody's got
22 SmartPhones and therefore clearly the 1.4 must have value.
23 Unfortunately, that's not the case. We would love
24 nothing more than for there to be some wonderful,
25 technological, you know, evolution that says hey this 1.4

⁵ EXHIBIT A - Objection_to_TSC_3rd_POR-1.doc, pg.

1 spectrum has got an increased value because now it can be used
2 for SmartPhones. That's just not the case.
3 Additionally, the 1.4 spectrum has unfavorable
4 spectrum configuration. *These bands are comprised of eight*
5 *megahertz spectrum capacity. This narrow configuration*
6 *severely limits the use to lower bandwidth consuming*
7 *applications such as smart grids, smart utility or radio.*
8 Again, it's just not usable for broadband and some of those
9 other more profitable things that the 2.0 spectrum can be used
10 for.

11 And finally, *Your Honor, there's a real*
12 *underdevelopment of the equipment that can be used for 1.4*
13 *because parties aren't out there developing this. Anyone who*
14 *wants to utilize the 1.4 spectrum is forced to go into*
15 *development mode themselves, basically, and develop the*
16 *equipment in order to utilize the spectrum.*

17 All of these things, frankly, make it inappropriate to
18 extrapolate the value from the 2.0 spectrum to 1.4. And I say
19 that not because I think we're here to look at valuation
20 because I know we're not. But just to provide *Your Honor with*
21 *the background with respect to why we do not believe that it's*
22 *appropriate to look at values that were received by DBSD,*
23 *values that were received by TerreStar and which are valued by*
24 *any other entity that may play in this market but who had more*
25 *valuable spectrum.*

1 Additionally, Your Honor, there have been allocations
2 that this lease is under market. First and foremost, I want to
3 say the debtors have not admitted, as Mr. Taub indicated, that
4 this is an undermarket lease. Rather, what we believe Mr. Taub
5 is referring to is a risk factor that's contained in our
6 disclosure statement. *It's a risk factor that says that this*
7 *might be under market. Not that we think it is. Not that we*
8 *admit that it is but it might be under market. This is no*
9 *different than a risk factor that a party puts in a plan or*
10 *disclosure statement that says this plan may not be confirmed.*
11 *It's a risk factor. This is what goes in a disclosure*
12 *statement.*

13 But I think it's really important to talk about the

14 lease. *The spectrum lease, as I said at the beginning of this*
15 *presentation, is held by TerreStar 1.4 Holdings LLC, a*
16 *nondebtor entity. Mr. Swarts, and potentially Mr. Taub, have*
17 *asked this Court to fashion some sort of a relief that would*
18 *somehow alleviate the nondebtor TerreStar 1.4 Holdings entity*
19 *from its obligations under this lease. This is not something*
20 *that the Bankruptcy Code provides.*
21 *However, even if it did, and somehow the spectrum*
22 *lease was terminated, this would create an unsecured claim of*
23 *significant amount with respect to the termination against*
24 *TerreStar 1.4 Holdings LLC. We believe that that termination*
25 *claim would suck up any value at that entity and there would be*

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1 *nothing to upstream to TerreStar Holdings Inc. on behalf of its*
2 *ownership interest in TerreStar 1.4 Holdings and nothing to*
3 *upstream to TerreStar Corporation on behalf of its indirect*
4 *ownership.*
5 So, Your Honor, taking all of that into consideration,
6 we believe that the only appropriate way to value the equity
7 ownership of TerreStar Corporation and TerreStar Holdings and
8 interim TerreStar Holdings, in TerreStar 1.4, is to look at the
9 money that's coming in under the lease that currently encumbers
10 the assets of TerreStar 1.4 which is the current spectrum
11 lease.

16. Later in the hearing, during her rebuttal, she stated:

3 Additionally, the 1.4 spectrum has unfavorable
4 spectrum configuration. These bands are comprised of eight
5 megahertz spectrum capacity. This narrow configuration
6 severely limits the use to lower bandwidth consuming
7 applications such as smart grids, smart utility or radio.
8 Again, it's just not usable for broadband and some of those
9 other more profitable things that the 2.0 spectrum can be used
10 for.

17. Ms. Schultz said nothing about the Airspan ecosystem development then underway or that FirstEnergy was engaged in the early field testing of a smart metering system utilizing the spectrum. These facts are confirmed by the Gibson Dunn comment timeline. It shows that in

October 2010, the month Terrestar Networks sought bankruptcy protection, that the 1.4 GHz Terrestar Corporation spectrum was deeply engaged in the development of a promising ecosystem for smart grids and metering as quote here:

“October 2010: One Dot Four Corp. enters into an agreement with Airspan to market leased Smart Grid networks to utility companies as final equipment becomes available.”⁶

18. In fact, in April 2012, *four months before Confirmation*, Airspan Networks, a TSC partner, was actively marketing a complete ecosystem of base stations, pico cell access points and devices to utilities utilizing the 1.4 GHz band.⁷ Although shareholders knew about this connection and actually met an Airspan representative in court, the depth of this ecosystem development was not presented to the Court by the debtors or their attorneys. Doing so would have dashed their plan to minimize the spectrum valuation and convert ownership of the company to their crony Preferred shareholders, including the Solus and Highland funds.

19. The Court denied the Examiner Motion and a subsequent similar Motion by Aldo Perez. The debtors repeatedly referenced the expense and time that an examiner would require as primary reasons to deny shareholder requests.

20. Had the TSC debtors embraced the company's shareholders and issued warrants or otherwise found a way to remain a public corporation and include shareholders in the plan, the company would have found its *raison d'être* sooner and with greater available financial resources. Instead, the company and its fiduciaries dispensed with the oversight of shareholders to focus on their new hedge fund private equity owners.

⁶ EXHIBIT B - TerreStar Letter to FCC (5.4.2018).pdf; TerreStar Timeline, pg. 1

⁷ EXHIBIT E - Airspan_Presentation_Winncom_0412.pdf, pg. 4-5

21. The debtors' professionals repeatedly made reference during the bankruptcy proceedings to the naiveté of shareholders. So, it is with some irony that former shareholders now observe TSC feigning ignorance about the harmful interference their WMTS business plan causes to current WMTS incumbents. The incumbents have fully developed ecosystems of base stations and a wide array of life-saving devices. Perhaps TSC fiduciaries could have simply asked WMTS incumbents in the ensuing years to engage in interference testing instead of committing to a flawed business plan before they understood its technical ramifications.

22. Alternatively, if they had simply moved expeditiously to develop their smart grid business, post-emergence, their business would have become the de facto incumbent instead of the other way around. Instead they wasted nearly 3-years on a Chapter 11 process whose sole purpose was to privatize the company and unjustly enrich management's crony investors at the expense of thousands of individual investors who believed their false statements concealing their true intent. It has been the company's flawed and corrupt management that has led again and again to corporate failure, ensnaring its investors in ever-widening financial disaster for its common shareholders.

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ARGUMENT

23. There is no guarantee, even if the FCC were to permit an extension waiver that the company would succeed this time. They have lurched from one erstwhile business to the next. First there was the Motient beeper business, which led to its bankruptcy. Then, there was the Terrestar FCC First Responder network; Lightsquared's ATC system using the Skyterra 1.6 GHz spectrum; Terrestar's FirstEnergy pilot program; and now Terrestar's current infatuation with WMTS.

24. Yes, Terrestar's business plans collided with those who were more committed to the development of alternative plans for the adjoining WMTS spectrum. However, Terrestar was hardly a novice in the competitive landscape of spectrum utilization. In fact, they have always chosen the path of greatest *private equity* enhancement to the path of the public interest. At the end of the day, the public interest and their public corporation shareholders were simply a vehicle to greater wealth for the few controlling public spectrum assets.

25. Terrestar's current argument before the Commission is that the FCC failed to consider the record. They argue that had the FCC done so, the extension waiver would have been granted. Has there ever been a corporation that has garnered more of the Commission's and public's attention than Terrestar and its associated corporations, while delivering so little in actual benefits to the American public? We have heard and invested in one boondoggle after another authored by these people. They have entered Chapter 11 bankruptcy protection twice after failing in their promises to shareholders and the public. It has all been exposed as nothing more than artful rhetoric.

26. In the past 15-years TSC has never provided substantial services. Could this finally be the time that they do so? Perhaps, but more likely it is not. They have been given every opportunity and they have repeatedly failed to deliver any service other than spectrum warehousing for their crony ownership.

27. Terrestar has been authorized to use the 1.4 GHz spectrum licenses since February 2008. That is more than 10-years. They used manipulated valuations to issue senior securities and subsequently to eliminate their common shareholders in bankruptcy. There is no reason to believe that there is a better outcome in the future for these companies if they are granted a waiver extension or that they will ever serve the public interest as stipulated in the FCC's charter. Any dispassionate analysis of their past performance must conclude that they will never do so. Even when *given free spectrum* that cost them nothing, except a couple years in bankruptcy and a few SEC filings to issue securities, they could not build a sound business that served the public interest. Even the *gift* of a clean balance sheet from a bankruptcy court 6-years ago was insufficient stimulation.

**TERRESTAR'S CIRCUMSTANCES ARE ALWAYS
UNIQUE AND UNUSUAL**

28. Terrestar claims that had it not moved forward with its plan to abandon the smart grid business and embrace the WMTS business that it would have been potentially catastrophic. They neglect that in 2012, with the Airspan Networks 1.4 GHz ecosystem fully developed, that they could have deployed it expeditiously and that WMTS devices in adjoining spectrum would have required the development and utilization of more robust filters and/or protocols.

29. Perhaps if they had been more focused on serving the public interest instead of eliminating their public shareholders, one could feel some empathy for them. However, no one forced Terrestar to abandon its prior business plan except Terrestar. They could have embraced a low-power smart grid business plan, for example, using access points with of 1 W or less. That would have provided plenty of bandwidth for narrowband utility meter reading.

30. TSC could have developed stringently designed and filtered devices and developed device installation rules that focused on point-to-point datacom or otherwise mitigated OOB by

ultra-low power WMTS devices. It was easier to claim others were at fault. Just like during the bankruptcy it was easier (and more self-serving) to stonewall shareholders than to seek a solution that included them.

31. Every business that Terrestar has ever been associated with has claimed “safety of life” issues as the crux of the services they plan to offer. There is nothing unique or unusual in this rhetorical slight-of-hand or that it has *never materialized* in any meaningful way. Perhaps different management and fiduciaries would take their duty to provide public services more seriously.

32. Terrestar complains that the FCC never asked for supplemental information or a demonstration about potential OOB or OOBE, as if it was the FCC’s job to imagine every possible wireless network design that the company might create. Apparently, Terrestar *did not understand* that the risks were spelled out in the license authority and it was incumbent upon them to devise a network that would *not* cause harmful interference to adjacent band incumbents. The RFK Engineering report about the 1.4 GHz band during the bankruptcy Confirmation certainly conveyed thoroughness, even to the extent of defining radar exclusion zones with great specificity. It is difficult to understand how a company with such experts at hand could have been so blindsided by the technical parameters of a proposed business plan embraced to the exclusion of other possibilities – until late in the licenses’ term.

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THE PUBLIC INTEREST IS SERVED BY WMTS

33. The most heart-rending element of this request for additional time to build a WMTS business that will serve people who are ill and dying is that it is a worthy concept. There is no doubt that it is a noble cause and that GE and Phillips, among others, are fully capable of building this service and integrating Terrestar's spectrum with current WMTS incumbent licensees in adjacent bands. Yes, this spectrum should be repurposed for this reason – to provide additional capacity to save and enhance the health of American lives.

34. Again and again Terrestar has used the rhetoric of the public interest to pad private pockets – using every legal and stonewall tactic they could imagine to do so. Ask Elektrobit about the way they were stiffed by the company's fiduciaries, when they returned pallets of the award-winning Genus phone. Ask them about later in Chapter 11 filing when they demanded payment for services rendered and were stonewalled for over year until finally being paid in full by the Preferred shareholders in a DIP financing arrangement that concealed the origin of the money. There is no reason to believe that this management would change their tactics or serve the public interest once their public interest rhetoric is no longer useful.

TERRESTAR MANAGEMENT SERVES ITSELF

35. For nearly 3-years shareholders begged Terrestar management to treat them fairly. For nearly 3-years the 2 GHz and 1.4 GHz spectrum was known to be a set of valuable intangible assets. Terrestar management could have chosen to act differently. One director immediately resigned when the company filed for bankruptcy protection. The CEO Jeffrey Epstein also resigned rather than face shareholders in court.

36. There were alternatives – lots of alternatives. The company could have said:

“OK. Look, the original business plan did not work. It took too long. It was too expensive. We think the 1.4 GHz spectrum is only worth \$175 million or \$.06 per MHz POP. This is what we’re going to do...we’re going to issue 1 warrant for every common stock share with a strike price equal to \$0.10 per MHz POP, exercisable within 5-years of emergence. That way you will share in any future success of the company.”

37. The company’s shareholders were committed to the company and would have stuck with management if they had adopted a strategy like this – based upon the interest of their public shareholders. They chose instead to pursue the private accumulation of wealth using the hollow rhetoric of the public interest, although their actual behavior has *never* embraced their rhetorical ideals. The FCC should deny the company’s rhetoric and look at the *facts* of what they actually did *and* what they did *not* do.

38. Of course developing a new spectrum band takes time. Of course a new ecosystem must be created for a new spectrum band and application. Of course base stations and devices must be designed, tested, manufactured and distributed *before* the spectrum can be put to *intensive use*. Terrestar’s management knew this intimately by the time they had launched TS-1 and designed and manufactured the Genus phone. They knew how long it took for their technical experts – like RKF Engineering to configure the satellites spot beams – a process that went on for months and months. These conditions are not something that they didn’t understand. They already had a working ecosystem in a pilot program with FirstEnergy in 2012, even though they argued otherwise in court. And, clearly, the system was completely designed and in the marketing phase 4-months before the TSC Confirmation hearing in August of 2012, as confirmed by the referenced Airspan Networks presentation and Gibson Dunn’s timeline.

39. Management was well aware of what it took to build a new service and business and they waited until the last possible moment to enquire of the WMTS incumbents in adjacent spectrum

whether their WiMAX ecosystem would cause harmful interference. It was gross negligence not to have coordinated these technical issues earlier in the development of the smart grid business.

40. The Part 27 license term is set at 10-years for a reason. It is a long period, but it requires due diligence, resilience, creativity and sufficient financing to be successful. The statutory risks of failure are borne by the licensee not the Commission. This is spelled out in every license grant. Many licensees have failed to meet build-out deadlines, like Straight Path and Fibertower, have been forced by the Commission to sell or relinquish their licenses. There is nothing unique or inequitable about the FCC's decision to cancel the Terrestar 1.4 GHz license authority. In fact, it would be unique and inequitable to licensees who have been forced to relinquish their licenses if the FCC did not do so in this case.

THE FCC's ORDER IS NOT CAPRICIOUS OR CONTRARY TO LAW

41. Terrestar uses AT&T Mobility as an example of a situation where a similar situation was afforded a waiver extension due to unforeseen technical complexities. The difference? There was no doubt that AT&T would eventually manage to properly coordinate the technical issues at issue. There was no long prior history of empty rhetoric or investors being jammed by their fiduciaries. To extrapolate from AT&T to the instant Terrestar proceeding is the height of absurdity.

42. Terrestar had a business plan that it was executing regarding the use of their spectrum for smart grid applications. They had first tested it in 2012 for FirstEnergy and had they deployed the system nationwide expeditiously, they would have been the 1st mover and WMTS ultra-low power devices would have had to have been designed around that extant reality. Instead, they chose to delay that build-out until they were no longer in control of the future of their business plan. They committed gross negligence by *not* engaging the adjacent band incumbents in a NPRM or otherwise coordinate the issues at hand. They waited until 1-year before the expiration of their licenses to

begin such a proceeding. And now they claim it is the FCC that is at fault and capricious? It is not the FCC's duty to husband deficient licensees to success any more than it is their job to pick winners and losers. The FCC provides authorization to use spectrum. It is the job of licensees to provide services that serve the public interest.

43. TSC shareholders have heard these arguments before – on the receiving end from \$1000 an hour attorneys bent on relieving them of their property. I guarantee that common shareholders *felt* it was “Capricious and Contrary to Law” when management was on the other end of that equation – eliminating investors’ equity after years of paying their salaries.

CONCLUSION

44. I urge the Commission to deny Terrestar's request for a waiver of the Part 27 rules. The machinations of these fiduciaries over the years make a mockery of the Character and Candor Rules of FCC licensees. It is time to transfer these licenses to parties that will use them for the public interest, not spectrum warehousing and unjust enrichment of those who care more about profit than serving the public interest.

/s/ Jeffrey M. Swarts
May 9, 2018

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